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# **The future of human rights protection in the new Libya: prospects and challenges**

by Nasser Algehitta



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## **Abstract**

There is no doubt that demand for the respect of human rights was one of the factors behind the Arab Spring and Libya is no exception. Four decades of absolute dictatorship headed by Muammar Gaddafi had been further tainted with gross violations of human rights of Libyan citizens and restrictions on their basic freedoms. Before the revolution, Libya was a country where no political parties were allowed. Freedom of expression and the press were extremely restricted. Reports about the country's human rights violations published by a number of international organizations documented large scale human rights abuses at the hands of the Gaddafi regime.

The 17 February 2011 revolution in Libya led to a turning point in the country's history. The regime of Muammar Gaddafi which had dominated the country since 1969 eventually collapsed, leading to the beginning of the painful task of reconciliation and state building. Nonetheless it is estimated that more than 7000 prisoners are held captive by various militias and armed groups without due process. This in addition to thousands of internally displaced persons.

State building involves the consolidation of a democratic state based on a democratic constitution. In 2011, a constitutional declaration was adopted to replace the one that had been in effect since 1969. This was intended as a stop-gap solution to allow the new political forces unleashed in the country time to write a new democratic constitution. To help consolidate the democratic state, three elements are required: that human rights be placed at its core; that these rights are truly implemented and applied; and lastly that the independence of the judiciary is safeguarded. For all this to happen it is also essential to strengthen education on human rights by encouraging non-governmental organizations to take a stronger role in promoting human rights. Libyan citizens can only avail themselves of these rights and strengthen their implementation if they know what they are and how they can benefit from their implementation.

## **Biographical Note – Nasser Algheitta**

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# The future of human rights protection in the new Libya: prospects and challenges

There is no doubt that demand for the respect of human rights was one of the factors behind the Arab Spring and Libya is no exception. Four decades of absolute dictatorship have been further tainted with gross violations of human rights of Libyan citizens and restrictions of their basic freedoms. Before the revolution, Libya was a country where no political parties were allowed. Freedom of expression and the press were extremely restricted. Reports about the country's human rights violations published by a number of international organizations documented large scale of human rights abuses at the hands of the Gaddafi regime.<sup>1</sup>

On the other hand, although the 17 February Revolution<sup>2</sup> was meant to be a turning and a breaking point with the past, gross violations of human rights continue to take place. It is estimated that more than 7000 prisoners are held by captive various militias and armed groups without due process.<sup>3</sup> This in addition to thousands of internally displaced persons.

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<sup>1</sup> *Libya: Rights at Risk*, Human Rights Watch, September 2008 available at <http://www.hrw.org> and *Libya, Time to Make Human Rights A Reality*, Amnesty International, April 2004 Report.

<sup>2</sup> The uprising against the Gaddafi regime is better known as 17 February revolution.

<sup>3</sup> Human Rights Watch available at <http://www.hrw.org/news/2012/07/06/libya-ensure-due-process-detained-ex-prime-minister>

This situation poses the question about the future of human rights protection in Libya and whether the new regime will be able to create a system where the rule of law and respect for human rights prevail.

In this paper, I will examine the country's effort to protect the rights of its citizens and what are the challenges facing such an effort. However, I will start with a historical account of the political structure of the country since independence and its impact on the situation of human rights.

## Human rights under the Kingdom of Libya

With the assistance of the United Nations, Libya was the first country to secure its independence through the UN mechanism back in the 1951. As a result of the technical assistance from the UN, the United Kingdom of Libya ended up having an advanced constitution with a strong commitment to protect human rights. In addition to civil and political rights for citizens, it went even further by guaranteeing the economic and social rights. It did not only impose an obligation upon the state to refrain from violating people's rights but it also established positive obligations on the state to act and provide certain protection and welfare for the benefit of all citizens. It was stated that equality between citizens when enjoying the rights therein must be guaranteed.<sup>4</sup> In the case of public offices, equal opportunities for all was also emphasized and discrimination was prohibited on all grounds including religion, race and language.<sup>5</sup> The constitution guaranteed the protection of liberty. Consequently arrest and detention was allowed only in a manner prescribed by law.<sup>6</sup>

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<sup>4</sup> Articles 11-12 of the 1951 Constitution.

<sup>5</sup> Ibid Article 11.

<sup>6</sup> Ibid. Article 16.

The constitution further stated that people must not be subject to torture and inhuman treatment under any circumstances.<sup>7</sup> The principle of legality was articulated in article 17. The right to privacy was also protected so that no intrusion in private property was allowed, no interference with private correspondence and other communication.<sup>8</sup> Freedom of religious belief,<sup>9</sup> freedom of the press, freedom of expression and the right to association were also stated.<sup>10</sup> The constitution established the right for everyone to have access to the courts in order to seek a judicial remedy.<sup>11</sup> Presumption of innocence and the right to a fair and public trial were also included.<sup>12</sup>

Furthermore, the constitution stipulated several economic and social rights. Articles 28, 29, 30 called for free and compulsory education to be provided for the citizens of Libya in the primary stage, a step which was rather necessary for a newly born state where only a limited percentage of its population ever went to schools.<sup>13</sup> Equally important was the right to work with a basic minimum wage, which was an essential part for the prosperity and development of the economy.<sup>14</sup> It also stated that family is the core unit of society and is entitled to the full protection of the state.<sup>15</sup>

It is clear that human rights as included in the 1951 constitution enjoyed special and strong protection in the newly established state. The dedication of a separate section in the highest legal document to the rights and freedoms of citizens was a clear signal that the drafters of the constitution wanted to make human rights a primary concern of the new country. Human rights in criminal proceedings were explicitly mentioned. The principle of legality, the right to a fair trial and the right to liberty and protection from arbitrary detention were all articulated. This was backed by the establishment of a modern judicial system which was impartial and independent from the influence of the executive. According to the constitution and the statute of the Supreme Court, principles embodied in the Supreme Court's rulings were given a strong backing and were of a binding nature upon all courts and other authorities.

Although the constitution laid the ground for the establishment of modern society, which in ideal circumstances would have been based on the rule of law, democracy and human rights, the reality of Libyan political experience showed a different picture. The first election to be held in Libya for the House of Representatives proved to be too much for the government to accept. The government was accused of electoral fraud to ensure the defeat of the National Congress Party which advocated the abandonment of the federal system in favour of a unitary state, a change which would see political power being transferred from Cyrenaica, the base of the Sunsi order to Tripolitania where the majority of Libyans live.<sup>16</sup> This led to wide unrest and party leaders were arrested. Some were also exiled. As a consequence of this election, Libya was never to hold a multi-party election

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<sup>7</sup> Ibid Article 16.

<sup>8</sup> Ibid. Article 20.

<sup>9</sup> Ibid. Article 21.

<sup>10</sup> Ibid. Articles 22, 23.

<sup>11</sup> Ibid. Article 14.

<sup>12</sup> Ibid. Article 15 & art 25.

<sup>13</sup> According to the International Bank for Reconstruction and Development (IBRD), at the time of independence, 90% of the population was illiterate. Quoted from Dirk. J Vandewalle, *supra* note no 161 p. 51.

<sup>14</sup> Article 34 of the 1951 constitution.

<sup>15</sup> Art 33 of the 1951 constitution.

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<sup>16</sup> Ronald Bruce (2008), *Libya from Colony to Independence*, One World publication, p 112.

again.<sup>17</sup> All political parties were banned and thus after 1952, all candidates for the lower house were government nominees.

### **Gaddafi's Libya and citizens' rights**

A group of army officers led by Colonel Muammar Gaddafi overthrew the monarchy in a military coup on 1 September 1969. The coup leaders suspended the 1951 constitution and issued a constitutional declaration. Despite the fact that the declaration was short and briefly worded, it covered quite a number of human rights including economic and social rights. Article 5 stated that people are equal before law. The right to religious belief<sup>18</sup> and the right to privacy were also stated and interference with private houses was prohibited unless it was done according to law.<sup>19</sup> Freedom of expression was also included.<sup>20</sup>

What should be stated here is that although the declaration stated basically all conventional rights, it established conditions on the individuals exercising these rights. Rights were restricted and could only be exercised as long as they were within the limits of people's interests and the principles of the revolution. This is evident in Article 13 which established conditions on the people's right to freedom of expression emphasizing that the exercise of such rights was permissible so long as it did not jeopardise the public interest or the revolution. Such a condition is vague and broad and could be interpreted widely. The emphasis was placed on the collective nature of rights, for instance the right to liberty was said to include the liberty for peoples and for the community as a whole. The economic and

social rights were also stipulated in the declaration. They included the right to free education, social security, right to health and right to work.

### **The state of human rights in Libya after the 1969 change of power**

The constitutional arrangement of any country is bound to have its effect on the legal system and on the wider situation of human rights, and Libya is no exception. However, in the absence of a binding and supreme human rights declaration, human rights of the individuals may be compromised.<sup>21</sup> In Libya, as a consequence of the ideology that originates in Gaddafi's theory of direct democracy, a number of established human rights principles were violated or restricted at best. The right to freedom of expression and the right to form or join a political party are contrary to the very principles of direct people's authority. Political activities such as forming and joining a political party or a particular group with a political agenda is regarded as a retreat from the teaching of the theory of the people's authority as stipulated in the Green Book which was regarded as the foundation of the political system in Libya. These political activities were outlawed and severely punished. Law No 17 of 1972 for the criminalization of political parties banned any form of group activity based on a political ideology opposed to the principles of the Al-Fateh Revolution of 1 September 1969. Article 3 of Law 17 prescribed the death penalty for

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<sup>17</sup>Ibid.

<sup>18</sup> Article 2 1969 Constitutional Declaration.

<sup>19</sup> Article 12 1969 Constitutional Declaration.

<sup>20</sup> Article 13 1969 Constitutional Declaration.

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<sup>21</sup> In 2<sup>nd</sup> March 1977 Gaddafi declared the creation of people's direct authority system in which he, in theory, assumed no official position. The Constitutional Declaration was replaced by the Declaration of People's Authority. It claimed that the Libyan people are running the public affairs themselves through the election of people's congresses and peoples' committees.



forming, joining or supporting groups which are prohibited by law.<sup>22</sup>

Control of the press and the media fell in the grips of the state. All newspapers were published and maintained by the public sector and there were no privately owned ones. In its 2008 Annual Report, *Reporters Without Borders* criticized Libya for heavily restricting the freedom of the press and not allowing nongovernment organizations to operate in the country.<sup>23</sup> The report stated that private media were allowed from 2007 onwards but they remained in control of Gaddafi's inner circle. Censorship is a common practise in Arab courtiers including Libya. *Reporters Without Borders* further observed that: "Press freedom is in no way guaranteed in Syria, Tunisia, Libya and Saudi Arabia and journalists there know they must censor themselves on pain of serious consequences. The authorities exert heavy pressure on journalists and especially media owners. Journalists who cross the line are quickly dismissed or even imprisoned in a total denial of justice. Flattery is still the best way to keep one's job and freedom."<sup>24</sup>

There were a number of other impacts on the judicial system and the rights of the accused persons to a fair trial before an independent and impartial tribunal. The establishment of the now abolished People's Court is one such example. The court was established with the mandate to try those who were accused of committing serious "crimes" that ran contrary to the principles of the political system established under the theory of direct democracy. This court was heavily

criticized on the grounds that it denied individuals the right to fair trial. By all means it was a special court with wide powers which opened the way for abuse and violation of the very rights that it claimed to protect.

Of course, the state system under Gaddafi had some positive effects. In relation to the economic and social rights, it is evident that the system, as least in its early years, wanted to ensure the welfare of its citizens. It promised to ensure equality between all members of society. Therefore, the state was made responsible for providing free health care, education and minimum standards of living. The equal access to court was also guaranteed. The State Lawyer's Corporation was established to ensure that everyone had access to a free and adequate legal assistance in case he needed it.

### **The future of human rights protection in the new Libya**

It could be said that the demand for respect of human rights and the rule of law were one of the objectives of the 17 February 2011 revolution. This is apparent in the constitutional declaration adopted in the aftermath of the uprising.<sup>25</sup> It states that Libya pledges to guarantee human rights and civil liberties and strives to adhere to international human rights instruments. The declaration has a section devoted to human rights which lists a number of basic human rights. Article 13 states that "the state guarantees the freedom of expression, opinion, free access to information and the right to assembly"; article 12 protects

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<sup>22</sup> Article 3 of the Law 17/1972 of the Criminalization of Political Parties published in the official gazette No 29/1972 of 3 July 1972

<sup>23</sup> Reporters without Borders, *Freedom of the Press Worldwide in 2008*, at [www.rsf.org](http://www.rsf.org), section on Libya p.160.

<sup>24</sup> Ibid. p.146.

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<sup>25</sup> A translation of the declaration can be read on the portal of the Cline Center of the University of Illinois at [http://portal.clinecenter.illinois.edu/REPOSITORYCAC/HE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZO9pfnC4py47DaBn9jLA742IFN3d70VnOYueW7t67gWXEs3XiVJJxM8n18U9Wi8vAoO7\\_24166.pdf](http://portal.clinecenter.illinois.edu/REPOSITORYCAC/HE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZO9pfnC4py47DaBn9jLA742IFN3d70VnOYueW7t67gWXEs3XiVJJxM8n18U9Wi8vAoO7_24166.pdf). (accessed 01.02.2014)



the right to privacy, the home and correspondence. Article 8 protects the economic and social rights including the right to work, education, free health and social security. The declaration also devotes a section to the rights of the accused in criminal proceedings and stipulates the principles of legality that “no crime or punishment unless prescribed by law”, the presumption of innocence, the right to a free and fair trial and the right to legal representation.

There is no doubt that the strong commitment for human rights in the interim constitution is a positive sign, however, the lessons of the previous regime should be carefully studied. The former regime was able to oppress political opposition and violate human rights despite its rhetoric about its commitment to human rights and its adoption of a human rights charter – apart from signing up to almost all major international human rights instruments. In addition, the protection of human rights needs, apart from a strong constitutional acknowledgement of human rights, a commitment from the government to implement them, an independent and effective judiciary and effective civil society organizations.

The constitution that will eventually emerge from the current constitutional process, should not only state the rights of individuals in broad terms, but also make it obligatory upon government to take positive steps in order to protect and promote human rights. Any restrictions on citizens’ rights must be stated in the constitution in clear phrases and the introduction of any restrictions and claw back articles should be relegated to lower legislation and regulations. Grave and gross violations of human rights such as torture and domestic violence must be outlawed and criminalized in the constitution.

The position of international human rights law and treaties in the national legal order should be stipulated in the new constitution. The current constitutional declaration is silent on this point. International human rights treaties that Libya is party to, provide an additional legal protection to human rights of individuals but without clear domestic direct effect of these instruments, they remain far from the reach of ordinary citizens. Only having clear provisions in the constitution which makes such treaties applicable nationally, can enable individuals to invoke them in a court of law against any arbitrary intervention from the government. This will also give the judiciary the power to apply international human rights treaties in their judgments.

### **The need for a stronger and independent judiciary**

One of the requirements for sound human rights protection is the presence of effective court systems. The judiciary is the main defender and the guardian of the citizens against arbitrary intervention by state authorities. It gives ordinary citizens the platform from where they can challenge the actions of both the legislative and the executive powers. The current organization of the judiciary is based upon the unity of the judiciary enjoying the mandate to deal with civil and administrative matters. The Supreme Court of Libya is the highest court in the land and is expected to play a major role in the promotion and protection of human rights. With its constitutional review power the court is well placed to carry out the role of checks and balance vis-à-vis the other branches of the state. The court has been brave enough, even during the Gadaffi regime, to declare a number of laws invalid because they curtailed fundamental citizens’ rights. It has also played

a similar role in the new Libya as will be stated later in this section.

The judiciary in Libya is composed of different layers of adjudications for civil, criminal and administrative matters. The structure of the judicial system in Libya is summarized in the following paragraph.

### **Court structure in Libya**

#### **The District Court (al-mahkamat al-juz'iyah)**

This is the lowest court dealing, in principle, with less serious cases. It has only limited jurisdiction in civil, commercial, personal status and criminal matters.

#### **The Primary Court (al-mahkamat al-ibtida'iyyah)**

The primary court has jurisdiction in all civil and personal status matters falling outside the jurisdiction of the district court. It hears cases both for the first time and as an appeal court. As a court of first instance, the primary court comprises of a single judge. In addition to its powers to hear cases for the first time, the primary court has the responsibility to consider appeals against rulings from the district court. Decisions of the district court concerning minor crimes can be challenged before the primary court. In this capacity the primary court is known as the court of appeals for minor crimes (*al-mahkamat al-junah al-must'nafat*) and is presided over by a panel of three judges.

#### **The Appeal Court (al-mahkamat al-isti'naaf)**

The appeal court constitutes the second layer of judicial proceedings. The appeal court in

Libya is also a court of first instance in certain (major) criminal cases, and in administrative cases. There are seven appeal courts in Libya. The appeal court reviews the decisions of the primary court in civil and family cases and also hears administrative cases for the first time. The most serious criminal charges related to felonies (or “major” crimes), are also heard in the appeal court before the criminal division, which is called the Assize Court.

#### **The Supreme Court (al-mahkamat al-a'ala)**

The Supreme Court is Libya's highest court. The main responsibility of the court is to ensure the correct and unified application and interpretation of the law throughout the country. Law 6/1982 on the Re-regulation of the Supreme Court mandates all courts to abide by the legal principles contained in the Supreme Court's rulings. According to this law, the court has jurisdiction over the claims of the unconstitutionality of any legislation brought before it by anyone, who has a direct, personal interest.

During the previous regime, the judiciary was marginalized and prevented from carrying out its task of protecting the rights of individuals. The previous regime created a parallel judicial system to try its political opponents. The so-called people's court was a tool to oppress the political dissidents and other political activists. The People's court was established by Act no 5/1988 to try those accused of crimes against the state security and stability. It was a special court with wide powers vested in the court's attorney general. Many political opponents and opposition groups were tried before this court. It was due to increased local and international criticism, that the court was abolished in 2006. The move was welcomed by Amnesty International which declared that it “warmly welcomes the

resolution passed yesterday by the general people's congress, - Libya's parliament - to abolish the people's court. The abolition of this exceptional court, known for trying political cases, was an important step forward for strengthening human rights in Libya, which should contribute to the effective and durable human rights protection in the country.”<sup>26</sup>

Furthermore, for a certain period of time the Supreme Court was also deprived of its constitutional review power and was prevented from assessing the constitutionality of any laws. This allowed the regime to pass legislation that curtailed and restricted citizens' rights.

The situation after the collapse of the Gaddafi regime has witnessed a number of positive signs that Libya is moving towards improved respect of human rights. The official commitment to the respect of human rights is evident in the constitutional declaration. This is supported by public statements from government officials, the Prime Minister and the Ministry of Justice. There was a strong effort to strengthen the independence of the judiciary. The legislator amended the law on the judiciary to further ensure the independence of the judiciary from any government influence or control. This has been achieved by excluding the Justice Minister from the composition of the Supreme Council of the Judiciary (*al-majlis al-a'ala al-qada*). The amendment also paved the way for more judges to be included in the Council.<sup>27</sup>

<sup>26</sup> Amnesty International, Public Statement Libya: Abolition of People's Court Is An Important Step, All index MDE 19/01/2005 News service No: 010

<sup>27</sup> Law no 4/2013 Concerning the Amendment of the Law on the Judiciary. According to Article 1 of Law 4/2013 concerning the Amendment of the Law on the Judiciary, membership of the Supreme Council for the Judiciary consists of the following: a supreme court judge, the head of the Judicial Inspection Authority, a judge from each appeal court in the country, the

However, the independence of the judiciary needs to be strengthened further by assigning the administrative and budgetary affairs of the judiciary to the judicial council. In addition, as of now the Ministry of Justice is responsible for administrative and financial matters of the judiciary. This can undermine the independence of the justice system and make it susceptible to pressure from the executive.

Another sign of the judiciary exerting its independence and power can be demonstrated by the recent judgment by the Supreme Court in which they made it clear that human rights are to be taken seriously by the judiciary. The case of the law no 37/2012 criminalizing the glorification of Gaddafi regime was a test for the judiciary and whether it would stand up to the new government if the latter tried to violate citizens' rights. The law was challenged by human rights activists and lawyers as being unconstitutional on the grounds that it violates the right to freedom of expression as guaranteed by the Constitutional Declaration. The Supreme Court in a brave decision declared the law null and invalidated it.<sup>28</sup> This case was seen as a sign that the judiciary was

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Attorney General, a member from the people's lawyers (renamed public lawyers in this legislation), a member from the government lawyers and a member of the Directorate of Law. It is also stated that the council elects its president and his deputy from among its members through a secret ballot. The Council is an organ established to oversee the judiciary, to ensure the effectiveness and integrity of the system, and to guarantee the highest level of independence of the judiciary from the influence of the executive. According to Article 5 of Law 6/2006 concerning the Judiciary, the Supreme Council for the Judiciary oversees the function of the judiciary and is empowered to issue all decisions regarding the administration of justice including making recommendations to the legislature to adopt laws and legislation regarding the judiciary, issuing decisions to establish new courts and determining their jurisdiction, and appointing judges, public prosecutors and members in the other judicial institutions.

<sup>28</sup> Decision of the Supreme Court issued on 14 June 2012

ready to confront the other branches of power and protect human rights. The decision was welcomed by national and international observers as a positive sign of Libya's commitment to human rights. In its statement, Human Rights Watch stated that "today, the Libyan supreme court has shown what freedom means. By declaring this law unconstitutional, it has affirmed free speech for Libyan people, even for critical and controversial views."<sup>29</sup>

### **Human rights awareness and the need for active civil societies**

The role of non-governmental organizations and civil society in advancing human rights cannot be underestimated. Governments tend to respond to pressure and lobbying from internal and external sources. The previous regime did not allow the establishment of such entities. In the new Libya, these organizations have thrived and many human rights organizations were registered and are active in the country. Amongst the work they do are the commentaries on new legislation but they also voice their concerns about human rights restrictions. They also keep records of persons who are detained and lobby for their release.

The National Council of Civil Liberties and Human Rights has been active in recording human rights abuses whether committed by government officials or revolutionary militias, urging government to take action to deal with such violations. The Council also publishes its annual report assessing the human rights situation in the country. According to its statute, the Council's main task is the promotion of the culture of human rights both in public and among state officials and law

enforcing agencies. The Council also advises the legislator to adopt laws to further protect human rights. It has the mandate to receive complaints from victims and to follow them up with the competent authorities. Also the Council issues regular reports documenting human rights developments in the country.<sup>30</sup>

In addition to the lobbying, civil societies should engage in awareness campaigns to promote human rights among citizens. When people are aware of their rights, they are most likely to fight for them. Human rights education must be provided to students in schools and universities. Special focus should be given to those working in law enforcing agencies such as the police, state security and the judiciary about the importance for human rights.

### **Conclusion**


There are many positive signs that the new Libya is serious about human rights and is determined to make them a reality in the country. I believe human rights protection will be strongly reflected in the constitution which the country will draft in the near future, however, many challenges stand in the way. There is the need to kick start the long awaited transitional justice process which will address human rights' violations in both previous and present political era. Thousands of detainees are held without judicial process. This is in addition to challenge of reigning in the militias and armed groups who are responsible for most of human rights abuses since the collapse of the Gaddafi regime. The security challenge is a major concern and government needs to establish a strong police force and an army.

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<sup>29</sup> *Libya: law restricting free speech ruled unconstitutional*, Human Rights Watch, available at <http://www.hrw.org/news/2012/06/14/libya-law-restricting-speech-ruled-unconstitutional> last visited 10 January 2014.

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<sup>30</sup> The National Council for civil liberties and human rights NCCLHR has been established by law 5/2011 passed by the National Transitional Council. For more see <http://www.ncclhr.org/index.php>



There is a need to draw up a national plan detailing how best to promote and protect human rights that does not stop at just introducing laws and legislation. The plan should be comprehensive and all stakeholders, official, semi-official and civil societies, should play their part. The plan should include in addition to the adoption of legislation stipulating citizens' rights and government responsibility for human rights, an awareness programme aiming at prompting human rights in schools and university curricula and amongst the public in general. Training courses in human rights should also be provided in the police academy and the institute of the judiciary to ensure that the judges, public prosecutors, police and other law enforcing agencies are well aware of the importance of human rights. Human rights abuses especially at the hands of state employees should be made a crime and those who are responsible for such abuses should have no immunity. Clear legal provisions in the penal law should be available to ensure no impunity for human rights abusers. These provisions should impose an obligation on the judicial system and other authorities to carry out a thorough and effective investigation and prosecution of incidents of the violation of human rights.

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